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No. 00-496

In The Supreme Court of the United States

MESA AIRLINES, INC. AND
WESTAIR COMMUTER AIRLINES, INC.,
Petitioners,

v.

UNITED AIRLINES, INC. AND SKYWEST AIRLINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

United Airlines entered into "code sharing" agreements with two regional air carriers to provide United Express service on particular routes. When a dispute arose as to the proper interpretation of those contracts, the regional carriers sought to invoke a series of state tort remedies to impose obligations on United above and beyond those to which it agreed in the parties' contracts. The Court of Appeals held that these tort claims were preempted by the Airline Deregulation Act of 1978 ("the ADA"). There are only two questions presented:

1. Whether the Court of Appeals properly applied this Court's opinion in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), in concluding that the regional carriers' tort claims — but not their contract claims — were preempted by the ADA; and

2. Whether this Court should grant certiorari in this case to reconsider the ADA preemption analysis adopted in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *Wolens* in light of its subsequent decisions interpreting the scope of preemption under ERISA and claimed conflicts in the Circuits concerning the outer limits of ADA preemption.

RULE 29.6 STATEMENT

Respondents are United Airlines, Inc. ("United") and SkyWest Airlines, Inc. ("SkyWest"). United is a wholly-owned subsidiary of UAL Corporation, which is publicly traded. SkyWest has no parent corporation; however, Delta Airlines, Inc., which is a publicly held corporation, owns 10% or more of SkyWest's stock.

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INTRODUCTION

Petitioners seek certiorari to overturn the Seventh Circuit's decision that the tort claims they asserted against United and SkyWest were barred by the preemption clause of the Airline Deregulation Act of 1978 (the "ADA"), which precludes states from enacting or enforcing any law "related to a price, route, or service of an air carrier." Section 105(a)(1) of the ADA, 49 U.S.C. § 41713(b).[1/] There are a number of reasons why the petition should be denied.

First, the Seventh Circuit's decision was based on a straightforward application of this Court's reasoning in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995). In *Wolens*, the Court held that the ADA does not preempt the application of state law to claims relating to airline rates, routes or services so long as the plaintiff is merely attempting to enforce a private agreement the airline voluntarily made, but that the ADA does preempt any attempt to enforce "state laws or policies external to the agreement" to enhance or enlarge the parties' bargain. In this case, the Seventh Circuit concluded that petitioners were seeking to use their state law tort claims to impermissibly enlarge or enhance the parties' bargain with respect to airline routes and services and, in so doing, to effectively use state laws to regulate airline decisions with respect to routes and services. Petitioners quarrel with the

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[1/] The original version of the preemption provision prohibited the enactment or enforcement of any state law "related to rates, routes, or services of any air carrier." 49 U.S.C. *App.* § 1305(a)(1). As part of a 1994 codification when Title 49 was reenacted, Congress altered this language slightly (changing "rate" to "price") but without making any substantive change. See *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1(1995). Because this Court's cases and the Seventh Circuit's opinion below use the term "rates, routes or services," we have done so as well throughout this brief.

Seventh Circuit's conclusion that their tort claims are designed to alter, rather than enforce, the parties' agreements. But that is precisely the kind of fact-specific determination that does not warrant this Court's attention.

Second, this Court's recent ERISA preemption cases should not cause it to re-examine the scope of preemption under the very different provisions of the ADA. Nor is there a real conflict among the Circuits on the proper interpretation of the term "related to" in the ADA. It is true that there is a conflict between the Fifth and Ninth Circuits with respect to the scope of the term "services" as applied to personal injury claims. But this case does not turn on the meaning of "services": the tort claims at issue here would be preempted even under the Ninth Circuit's very narrow definition of that term.

Third, even if the Court concludes that there is a conflict among the Circuits, this case is not an appropriate vehicle to use to resolve it. This case is still in an interlocutory posture. Moreover, the issues it raises are unlike the issues raised in any of the other ADA preemption cases petitioners cite. Virtually all of the litigation under the ADA since *Wolens* has been over employee and personal injury claims or about claims that are not directly related to rates, routes or services, but that are claimed to have an *indirect* impact on those prohibited areas. In those cases, the courts have been called upon either to determine the proper scope of the term "services" or to make a judgment with respect to the outer limits of what types of claims should be deemed "related to" rates, routes or services. This case, by contrast, involves a dispute between airlines that deals directly with airline routes and services, no matter how narrowly the term "services" is defined. As a result, this case does not squarely raise the issues that have caused the Circuits to disagree.

Indeed, the tort claims at issue in this case would be preempted even if the Court were to adopt the test petitioners suggest, under which the court "focuses on the purpose and policies of the ADA, rather than on the literal language of its preemption clause." Pet'n at 15. As the Seventh Circuit concluded, in this particular case, the purpose and policies of the ADA require preemption in order to avoid the "mess" that would result from "applying the conflicting tort principles of 50 different states to these interstate and international transactions." App. 15a.

STATEMENT

In 1990 and 1992, United entered into "code-sharing" agreements with Mesa Airlines, Inc. and a Mesa subsidiary, WestAir Commuter Airlines, Inc., under which Mesa and WestAir agreed to provide scheduled airline service under the "United Express" service mark on specified routes in a number of western states. Exs. 1 and 2 to United's Complt., R.6 (filed under seal). These code-sharing agreements were beneficial to Mesa and WestAir because they were given the right to use United's logos and service marks, their flights were listed in United's computer as United flights, and they were given a share of certain revenues. In order to ensure that the "United Express" service was properly coordinated with United's nationwide service to hub airports, United had the contractual right to exercise substantial control over the services Mesa and WestAir provided to the public, the routes they flew, and the fares they charged. App. 2a.

In 1997, United replaced WestAir with SkyWest Airlines on eight routes flown out of Los Angeles. When WestAir and Mesa disputed United's right to make such changes, United filed this diversity action to obtain a declaration with respect to its contract rights. Subsequently, Mesa abandoned or reduced

the number of flights it flew on certain routes that it had an exclusive right to fly out of the Denver airport, claiming that it was losing too much money on those routes. United notified Mesa that it was in default under its contract. When Mesa failed to cure following receipt of that notice, United terminated its agreement with Mesa. Thereafter, WestAir's code-sharing agreement with United came to an end and was not renewed. App. 3a.

United amended its lawsuit to seek both a declaratory judgment that its actions in terminating Mesa were proper under the contract and damages for an alleged breach of that contract. Mesa and WestAir counterclaimed, also seeking damages for breach of contract. But Mesa and WestAir also brought tort claims against United under Illinois law seeking damages, including punitive damages, for alleged breach of fiduciary duty and fraudulent inducement. In addition, WestAir and Mesa brought a third-party claim against SkyWest for tortious interference. App. 4a.

Although Mesa and WestAir were expressly described as "independent contractors" in their contracts with United, they claimed that those contracts had somehow created a partnership or joint venture which allegedly imposed on United "fiduciary duties of care and loyalty implied in law." Mesa Counterclaim ¶ 69; WestAir Counterclaim ¶ 24. As the Seventh Circuit noted in its opinion, Mesa and WestAir claimed that these alleged fiduciary duties imposed "obligations on United that *override* the contract." App. 11a (emphasis in original). Thus, even if United had the contractual right to terminate its agreement with Mesa or to shift routes from WestAir to another carrier, Mesa and WestAir argued that "United had a fiduciary obligation to use its contractual powers for *their* economic benefit, rather than for its own, and that they are entitled to punitive damages because (in the language of their brief)

United attempted 'to terminate Mesa's rights and interests in the Partner Agreement for its own benefit and to Mesa's detriment.'" App. 12a (emphasis in original).[2/]

Mesa also sought damages under a fraud-in-the-inducement theory, claiming that United had defrauded it into incurring significant expenses (including buying certain aircraft at an allegedly inflated price) by promising to enter into an extended ten-year exclusive agreement with Mesa. Mesa admitted that United had in fact entered into such an extended agreement, which included the terms that United had allegedly promised. It was that agreement that United subsequently terminated. Mesa sought to use its fraud-in-the-inducement claim to hold United liable for terminating the agreement even if United had a contractual right to do so, on the ground that United had intended all along not to follow through on the promises it had made in the contract and had either misrepresented its own intentions or acted with "reckless disregard for their truth or falsity." Mesa Counterclaim ¶¶ 16-18, 59.

Finally, Mesa and WestAir filed a third-party complaint against SkyWest, claiming that SkyWest had induced United to breach its contracts with them by awarding SkyWest the right

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[2/] In his opinion for the Court, Judge Easterbrook expressed "skeptic[ism]" with respect to Mesa and WestAir's claims that their contracts created a partnership with United. App. 12a. The only basis Mesa and WestAir offered for that claim was that United referred to regional carriers as its flying "partners" and Mesa's code-sharing agreement is entitled an "Expanded Partner Agreement." As Judge Easterbrook noted, businesses "often refer to suppliers, customers, and producers of complementary products as 'our partners' without summoning up fiduciary duties." *Id.*

to become a United Express carrier on some of the same routes that WestAir and Mesa had been serving. Third-Party Complt. ¶¶ 14, 21. Petitioners claimed that SkyWest had induced the alleged breach by offering to transfer to United "at least two departure gates at LAX that SkyWest owned and United desperately wanted (and had been unable) to acquire." *Id.* ¶¶ 15, 20.

United and SkyWest moved for judgment on the pleadings on the tort counterclaims and the third-party complaint, on the ground that Mesa and WestAir were attempting to use state common law tort claims to effectively regulate airline decisions with respect to rates, routes or services and that those claims were therefore preempted by Section 105(a)(1) of the ADA. The district court granted the motion, but certified its ruling for interlocutory appeal under 28 U.S.C. § 1292(b). The Seventh Circuit granted leave to appeal on an interlocutory basis and affirmed.

In his opinion for a unanimous court, Judge Easterbrook concluded that this Court's decision in *Wolens* was controlling. He reiterated the Seventh Circuit's view in *Travel All Over The World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), that state law tort claims were preempted under *Wolens* if application of the state's rule would have a "significant economic effect" on airline rates, routes or services. The court found that the *Wolens* test was easily met in this case: the tort claims at issue here are "all about" "routes and divisions of revenues" and thus would "assuredly" "have a significant effect on air carriers' rates, routes or services." App. 14a.

The court rejected petitioners' claim that they were merely trying to use their tort claims to enforce the bargain United had made. Instead, it concluded that in their fraud and breach of fiduciary duty claims, petitioners were impermissibly

trying to use "external norms" supplied by state law to "change the parties' financial arrangements" and to "override" their contractual agreement. App. 11a. The court also upheld the dismissal of the third-party tortious interference claim against SkyWest, noting that such claims can "readily" be used to "get around contracts (or limits on the means of enforcing contracts)" and to "suppress competition, which would undercut the Airline Deregulation Act of 1978," which was designed to ensure competition in the airline industry. App. 14a.

Although the court felt constrained to rule as it did by *Wolens*, Judge Easterbrook also made it clear that allowing petitioners to proceed with their tort claims would be contrary to the purpose and policies behind the ADA. Noting that the case at bar involves regional service by Mesa and WestAir to multiple states, which United used to "construct through rates and routes for travel across many jurisdictions," he concluded that neither Illinois nor any other state had "much of a claim" as a source of tort law and that applying "the conflicting tort principles of 50 different states to these interstate and international transactions would make a mess of things." App. 15a. By contrast, finding such claims preempted served the ADA's purpose of promoting competition by allowing a system of voluntary agreements, with "nationally uniform overrides" supplied by the Department of Transportation, to "flourish." *Id.*

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit Properly Applied This Court's Decisions In *Morales* And *Wolens*.

This Court first addressed the ADA's preemption clause in *Morales v. Trans World Airlines*, 504 U.S. 374 (1992). In that case, the Court held that an attempt by state attorneys general to use the states' general consumer fraud laws to enforce airline fare advertising guidelines promulgated by the National Association of Attorneys General was preempted. The Court explained that "[s]tate enforcement actions having a connection with, or reference to, airline 'rates, routes, or services,' are pre-empted" under the ADA. 504 U.S. at 383. That standard was met because the guidelines the attorneys general were attempting to enforce purported to establish binding requirements as to how tickets could be marketed if they were to be sold at particular prices. If an airline failed to abide by the guidelines, a consumer would have the right to sue for damages, "effectively creating an enforceable right to [a particular] fare." 504 U.S. at 388. The Court held that the "express references" to fares in the guidelines were sufficient, in and of themselves, to meet the "related to" requirement of the ADA. *Id.*

The Court then went on to hold that, in any event, "it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares." 504 U.S. at 388. The Court explained that the disclosure requirements set forth in the guidelines made it virtually impossible for airlines to widely advertise discounted fares that were subject to substantial restrictions; by significantly curtailing the airlines' ability to "market their product," the guidelines would have a significant — and hence prohibited — impact on the fares the airlines charged. 504 U.S. at 390. At

the end of its opinion, the Court observed that it was not holding that all state regulation of the "non-price aspects" of airline advertising was preempted. The Court recognized that some state actions "'may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have preemptive effect." *Id.* (brackets in original). But the Court found the guidelines at issue in *Morales* to be clearly within the scope of preempted state regulation and therefore declined to offer any guidance with respect to the outer limits of the preemption required by the ADA.

In *Wolens*, the Court addressed the question of what constitutes "enforcement" of a state law relating to airline rates, services or routes. The issue in *Wolens* was whether passengers disappointed with retroactive changes American Airlines had made in its frequent flyer program could sue the airline for damages for breach of contract and for alleged violations of the Illinois Consumer Fraud Act. Invoking the test adopted in *Morales*, the Court concluded that the plaintiffs' "complaints state claims 'relating to [air carrier] rates, routes or services." 513 U.S. at 225. The Court noted that "[p]laintiffs' claims relate to 'rates,' *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates." 513 U.S. at 226. Having concluded that the plaintiffs' claims related directly to airline rates and services, the Court found it unnecessary to consider whether those claims also related *indirectly* to rates or services because they had a forbidden significant economic impact on either rates or services.

The Court then addressed the question of whether allowing plaintiffs to pursue their claims for damages under the Illinois Consumer Fraud Act and their breach of contract claims would constitute the impermissible enforcement of a state law

relating to air carrier rates, routes or services. The Court held that plaintiffs' consumer fraud claims were preempted because the imposition on airlines of state-created rules designed to prevent consumers from being deceived was contrary both to the text of the preemption clause and to the ADA's "purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services." 513 U.S. at 228. The Court then held that the plaintiffs' breach of contract claims were *not* preempted because those claims did not allege any "violation of state imposed obligations," but rather sought "recovery solely for the airline's alleged breach of its own, self-imposed undertakings." 513 U.S. at 228.

The *Wolens* Court emphasized that the distinction it was making was fully consistent with the ADA's purpose to "promote 'maximum reliance on competitive market forces.'" 513 U.S. at 230. The Court stated that "[m]arket efficiency requires effective means to enforce private agreements" and that the "stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time.'" *Id.* At the same time, however, the Court cautioned that state law could *not* be used to expand the bargain the parties had made:

> The ADA's preemption clause, § 1305(a)(1), read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with

> no enlargement or enhancement based on state laws or policies external to the agreement.

513 U.S. at 232-233.

In this case, the Seventh Circuit applied precisely the analysis required by *Morales* and *Wolens*. The court first determined that the claims at issue here "related to" airline rates, routes or services, both because they were "all about" rates, routes and services and because allowing petitioners to pursue those claims would plainly have a "significant effect" on rates, routes, and services. Apart from disparaging the *Morales* and *Wolens* test as unduly relying on the "literal language" of the statute, petitioners do not attack this portion of the Seventh Circuit's decision. Nor could they do so. As in *Morales*, giving Mesa and WestAir the right to sue for damages under a tort theory for their termination as United Express carriers on certain routes would "effectively creat[e] an enforceable right to" those routes as a matter of state law. 504 U.S. at 388.[3/]

In the second stage of its analysis, the Seventh Circuit considered the very same argument petitioners make in this Court: that their tort claims should be permitted as an adjunct to their breach of contract claims in order to enforce and

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[3/] Similarly, as the Seventh Circuit concluded, giving petitioners the right to sue SkyWest for tortious interference would "assuredly" have a significant effect on air carriers' rates, routes or services because it would suppress competition for regional routes by subjecting third parties to lawsuits based on a state's public policy with respect to the limits of permissible competition. App. 14a (citing *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 865 (7th Cir. 1999), which explains how the often unclear boundaries of the privilege to compete recognized in state tortious interference law may be used to suppress competition).

"protect" the sanctity of the parties' voluntary agreements. After carefully reviewing the nature of each claim asserted by petitioners, the Seventh Circuit rejected this argument. The court concluded that their fraud claim was "not by any stretch of the imagination a request to enforce the parties' bargains; it is a plea to replace those bargains with something else" and that their breach of fiduciary duty claims sought to impose on United "duties that *override* the contract." App.10a-11a (emphasis in original). The Seventh Circuit followed *Wolens* in holding that state law cannot be used in this fashion, to effectively regulate agreements with respect to airline rates, routes or services by "enlarg[ing] or enhanc[ing]" the bargain an airline voluntarily made "based on state laws or policies external to the agreement."513 U.S. at 233.

The Seventh Circuit also rejected petitioners' claim that their tortious interference claim was merely an attempt to protect the "sanctity" of their agreement with United: the court noted that such claims were often used to "get around contracts (or the limits on the means of enforcing contracts)" and therefore are "regularly treat[ed]" as preempted in labor law and that such claims serve to "suppress competition, which would undercut the Airline Deregulation Act of 1978." App. 14a.

Petitioners simply ignore the Seventh Circuit's rulings on these issues, repeating their argument that they are only trying to enforce and "protect" the bargains they made. Whether the Seventh Circuit properly characterized the particular tort claims made in this case, however, is not an issue that warrants review by this Court. Contrary to petitioners' dire predictions (Pet'n at 20), "injustice and anarchy" will not result in the marketplace for regional air carrier service if Mesa and WestAir are precluded from asserting state tort law claims in addition to their breach of contract claims. The courts remain

free to fully and completely enforce the terms of the parties' voluntary agreements. Moreover, as Judge Easterbrook observed, "[m]arket forces . . . constrain" the major carriers' "exercise of contractual powers": major carriers need efficient and reliable service from regional carriers who fly under code-sharing agreements in order to ensure that passengers will not shift to other major airlines who provide better connecting flights. App. 2a.

Petitioners' contention (Pet'n at 7) that the Seventh Circuit's decision precludes airlines from entering into enforceable partnership agreements should also be rejected. The Seventh Circuit was properly skeptical of petitioners' claim that the parties in this particular case in fact entered into a partnership arrangement, rather than an arm's length contractual relationship. App. 12a. Furthermore, the Seventh Circuit found that petitioners were trying to use state law concepts of fiduciary duty to *override* the explicit bargain the parties made — thus effectively using state law policies to regulate an agreement with respect to airline rates, routes and services. As the Seventh Circuit held, that kind of a breach of fiduciary duty claim is plainly preempted. But the Seventh Circuit's ruling says nothing about what the result would be in a case where it is apparent that two airlines entered into what both sides understood was a partnership agreement and one party was attempting to use concepts of fiduciary duty to interpret the agreement — rather than to override it. That situation was not presented here and should not be considered unless and until it arises.[4/]

[4/] Whether any type of fraudulent inducement claim could be asserted must also await another day. The Seventh Circuit noted that a claim of fraud in the inducement might well be proper when the allegedly defrauded party sought to rescind the agreement or restore

Petitioners also completely ignore the Seventh Circuit's conclusion that preemption is fully consistent with the policies and purposes of the ADA because applying the differing tort laws of the various states to the kinds of contractual relationships at issue here would "make a mess of things." App. 15a. As this Court recognized in *Wolens*, the market efficiency the ADA was designed to achieve depends on stability and certainty. But, as the Court also recognized, there can be no stability and no certainty if individual states are free to override the bargain the parties themselves made by imposing their own policies through the enforcement of state tort law claims. Similarly, the competition the ADA was designed to foster will not flourish if regional air carriers competing for code-sharing agreements are constrained by the conflicting and often ambiguous policies of the various states with respect to tortious interference.

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the status quo. App. 10a. All the court held was that the very odd fraud in the inducement claim asserted here — which was essentially a claim that United never intended to perform the agreement it entered into — was preempted because it was a transparent attempt to use state law policies external to the parties' agreement to alter the bargain they had struck with respect to United's right to terminate the agreement.

II. This Court Should Not Grant Certiorari To Reconsider Its Rulings In *Morales* And *Wolens*.

A. This Court's ERISA Preemption Cases Do Not Require A Reexamination Of The Standards For Preemption Under The ADA.

In *Morales*, this Court construed the phrase "relating to" in the ADA's preemption provision broadly. 504 U.S. at 383. In support of that broad construction, the Court relied on the plain meaning of the words themselves and on its prior decisions broadly construing the term "relating to" in ERISA preemption cases. *Id.* Based on that reading of the ADA preemption provision, the Court rejected the argument that only state efforts to prescribe airline rates, routes or services or to specifically regulate the airline industry were preempted. *Id.* at 385. Again citing ERISA cases, the Court concluded that "laws of general applicability" were preempted when applying them to an airline's conduct would have the "forbidden significant effect upon" rates, routes or services. *Id.* at 388. The Court recognized that other types of state regulation might affect airline rates, routes or services in too "'tenuous, remote or peripheral a manner' to have pre-emptive effect." *Id.* at 390. Inasmuch as the case before it did not present a "borderline question," the Court expressed no view as to where it would be appropriate to draw the line. *Id.*

Petitioners argue that subsequent ERISA cases have cut back on the breadth of the term "relating to" to such an extent that the Court should now reconsider its rulings in both *Morales* and *Wolens*. Petitioners suggest that the Court should reconsider whether ADA preemption should extend to laws of general applicability or whether it should be limited to state regulation aimed directly at airline rates, routes or services. Petitioners also urge the Court to reconsider the "significant

effect" test that the Seventh Circuit followed in this case, on the ground that the Court should move away from a "literal" interpretation of the ADA preemption provision, in favor of an interpretation that is focused entirely on the "policies" behind the ADA.

The recent ERISA cases do not provide a basis for reconsidering this Court's interpretation of the very different provisions of the ADA. The preemption provision in ERISA, by its very nature, presents a greater line-drawing challenge than the ADA, because it supersedes "any and all State laws insofar as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a). A "broad" interpretation of "relating to" in this provision could conceivably preclude the application of *any* state law to any employee benefit plan. In the cases petitioners cite, the Court has concluded that Congress did not intend to sweep so broadly and has instead looked to the objectives of the ERISA statute as a "guide to the scope of the state law that Congress understood would survive." *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). See also *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 519 U.S. 316, 329 (1997) (state law not preempted where the "indirect economic influence" of a state law of general application did not limit a plan administrator's choices and thus did not function as a regulation of the plan itself).[5/]

[5/] Petitioners miscite *Boggs v. Boggs*, 520 U.S. 833, 841 (1997), for the proposition that ERISA's preemption provision is limited to "those state laws that actually interfere with the purpose of the federal statute." In *Boggs*, the Court did hold that a Louisiana law was preempted because it conflicted with ERISA. But the Court then went on to observe that the conflict made it unnecessary to "inquire

Unlike its counterpart in the ERISA statute, the ADA's preemption provision does not purport to preempt the enforcement of all state laws "relating to" a particular kind of entity — such as "airlines." Instead, it singles out the enforcement of laws "relating to" particular subject matters — an airline's rates, routes or services. There may be interpretive questions as to what each subject matter entails (see Part B, *infra*), but once the scope of "rates, routes or services" is defined, there is simply not the same kind of confusion as to what was intended that the Court has wrestled with in the ERISA cases. In fact, to conclude that there is no preemption even though the enforcement of a state law would have a "significant effect" on an airline's rates, routes or services would require the Court to ignore the plain language of Section 105(a)(1) of the ADA.

In any event, as Judge Easterbrook pointed out in this case, this Court's most recent ERISA opinion in *Unum Life Ins. Co. v. Ward*, 526 U.S. 358 (1999), demonstrates that the Court has not deviated from the basic principles announced in *Morales* and *Wolens*. In *Unum Life Ins. Co.*, the Court concluded that a state law of general applicability with respect to agency relationships was preempted as applied to an ERISA plan because it would effectively "regulate the basic services that a plan may or must provide to its participants or beneficiaries." 526 U.S. at 379. *Unum Life Ins. Co.* is entirely consistent with this Court's holding in *Morales* that ADA preemption extends to laws of general applicability when the enforcement of those laws has the forbidden "significant effect" on airline rates, routes or services.

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whether the statutory phrase 'relate to' provides further and additional support for the pre-emption claim." *Id.*

B. The Cases Petitioners Cite From Other Circuits Do Not Create A Circuit Split Over The Scope Of The Term "Relating To" In Section 105(a)(1) Of The ADA.

Petitioners contend that the Court's ERISA cases have engendered confusion in the lower courts with respect to the scope of ADA preemption, which this Court should grant their petition to resolve. In support of that argument, petitioners cite the Second Circuit's decision in *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77 (2d Cir. 1997), the Third Circuit's decision in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998), and the Ninth Circuit's *en banc* decision in *Charas v. TransWorld Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998); they also refer to, without citing by name, the Fifth Circuit's decision in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (Pet'n at 12 n.9).

It is clear that there is a conflict between the Ninth Circuit's *Charas* decision and the Fifth Circuit's *Hodges* decision. But that conflict concerns the proper definition of the word "services" in Section 105(a)(1) of the ADA. In *Hodges*, the Fifth Circuit held that a state law personal injury claim could be preempted if it arose out of an airline's policy of providing (or not providing) a particular service, but that a claim arising out of the allegedly wrongful *manner* in which the service was provided was not preempted. 44 F.3d at 336. In *Charas*, the Ninth Circuit expressly rejected this distinction, holding that the term "services" should not be applied at all to passenger services, but rather should be limited to "such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." 160 F.3d at 1265-66.

Northwest Airlines has recently filed a Petition for Certiorari asking the Court to resolve this conflict in a case by airline employees seeking damages for exposure to second-hand smoke on flights to Asia. See *Northwest Airlines, Inc. v. Duncan*, No. 00-404. Even if the Court grants Northwest's petition, however, it should not grant the petition in this case or hold it for the disposition of the Northwest case. Unlike *Charas*, *Hodges* or the *Northwest Airlines* case, this case does not present any issue with respect to the proper definition of "services." Indeed, even under the Ninth Circuit's restrictive definition of that term, the tort claims at issue here would relate to airline routes and services, because they directly relate to "such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." 160 F.3d at 1265-66.

The Second Circuit's decision in *Abdu-Brisson* also does not create any conflict with this case. At issue in *Abdu-Brisson* was a claim made by Delta pilots that some of its seniority rules and other employment conditions violated state and local age discrimination laws. Delta did not argue — nor could it argue — that the claims in that case directly concerned its rates, routes or services. Instead, Delta argued that any change in the employment conditions at issue in the lawsuit would have a significant economic impact on its prices and thus would "relate" indirectly to those prices.[6/] The Second Circuit held that Delta had not proved that there would be any substantial effect on prices, routes or services if the state and local antidiscrimination laws were applied to it. 128 F.3d at 85. Without such proof, the court concluded that the supposed state

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[6/] Delta also argued that changes in its work rules sought by the plaintiffs would disrupt relations on the flight deck and thus have an adverse impact on its "services."

interference was too tenuous, remote or peripheral to be deemed "related to" prices, routes or services. *Id.* at 86. Other courts have followed the same reasoning in cases where employees seek damages against airlines under state anti-discrimination laws. See *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463 (11th Cir. 1998); *Wellons* v. *Northwest Airlines, Inc.*, 165 F.3d 493 (6th Cir. 1999).

Abdu-Brisson is not in conflict with the case at bar, where the Seventh Circuit properly concluded that application of state tort laws to petitioners' claims would have the requisite "significant effect" on an airline's rates, routes and services. Moreover, *Abdu-Brisson* clearly presented a borderline situation, testing the limits of the "related to" concept. The fact that the Second Circuit expressed some frustration concerning the lack of a bright-line test to decide how to draw the appropriate line is hardly a reason for granting certiorari in *this* case, where (as in *Morales* and *Wolens*) the claims relate directly to an airline's rates, routes or services.

Finally, the Third Circuit's decision in the *Taj Mahal* case also does not create the kind of conflict that requires resolution by this Court — even though the *Taj Mahal* court expressly declined to follow the Seventh Circuit's decision in *Travel All Over The World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), and the Seventh Circuit in this case rejected the test proposed by the Third Circuit in *Taj Mahal*. Like *Abdu-Brisson*, the *Taj Mahal* case involved what was clearly a borderline situation. The plaintiff in that case was a travel agency that sued an airline for defamation for giving explanatory letters to passengers whose tickets were not honored because they were apparently stolen. The travel agency claimed that the letters implied that it had knowingly trafficked in stolen goods. The airline sought dismissal of the defamation claim on the ground that it was preempted by the ADA. The

Third Circuit held that it was not, in the process suggesting that the test of ADA preemption was "whether a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation." 164 F.3d at 194.

In its opinion in this case, the Seventh Circuit rejected the Third Circuit's test. Judge Easterbrook read the *Taj Mahal* opinion as creating a two-part test, under which a state tort claim would be preempted either if its application frustrated the purpose of the ADA or it imposed public-utility style regulation. App. 8a.[7/] The Seventh Circuit refused to adopt this more limited test, concluding that under *Morales* and *Wolens*, a claim is preempted if either "the state rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have a significant economic effect upon them. App. 9a (emphasis in original; internal quotations omitted).

Although there is undoubtedly a difference between the formulations adopted by the Third and Seventh Circuits, there is no reason to believe that these different formulations will yield different results. In fact, in *Travel All*, the Seventh Circuit reached exactly the same conclusion that the Third Circuit did in *Taj Mahal* with respect to a travel agency's virtually identical claim for defamation as a result of statements an airline allegedly made about its business practices. The Seventh

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7/ Judge Easterbrook's reading of the *Taj Mahal* opinion was plainly the correct one. In applying the new test it articulated to the particular facts before it, the Third Circuit made it clear that the test was disjunctive, holding that there was no preemption because "[a]pplication of state law [to plaintiff's defamation claim] does not frustrate Congressional intent, *nor* does it impose a state utility-like regulation on the airlines." 164 F.3d at 195 (emphasis added).

Circuit agreed that such a defamation claim was *not* preempted because it did not relate at all to the airline's rates, routes or services, but rather related only to the travel agency's alleged business practices. 73 F.3d at 1433.[8/]

The lack of any conflict in the conclusions the Third and Seventh Circuits have reached with respect to specific claims and the great disparity between the type of claim at issue in *Taj Mahal* and the type of claim at issue here both counsel against granting the Petition. Future cases may show that the differences between the two Circuits are more apparent than real. In any event, the Court should wait to see whether a clear conflict in results develops.

III. This Case Does Not Provide A Proper Vehicle For Resolving Whatever Conflicts May Exist.

Even if the Court concludes that there are conflicts that should ultimately be resolved or that it should undertake the line-drawing exercise the Court eschewed in *Morales*, this case does not provide an appropriate vehicle to do so. The case is

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[8/] Petitioners also cite the *Taj Mahal* court's conclusion that punitive damages are not preempted by the ADA, claiming that this too constitutes a conflict with the Seventh Circuit's decision in *Travel All*. Pet'n at 10 n.7. But nothing in *Travel All* suggests that a party suing an airline is prohibited from obtaining punitive damages with respect to a tort claim that is *not* preempted. Instead, in *Travel All*, the Seventh Circuit held that the plaintiff could not seek punitive damages on a breach of contract claim that related to airline services (and hence fell within the scope of the ADA's preemption provision) because, although claims to enforce the parties' voluntary agreement survived, any attempt to enhance the parties' bargain by seeking punitive damages was precluded under *Wolens*. *Travel All*, 73 F.3d at 1432 n.8.

still at an interlocutory stage. Thus, subsequent events may well moot the need to make any final decisions in this case.

Moreover, the claims at issue here do not resemble any of the cases petitioners cite, where the lower courts faced personal injury or employee claims or claims that are clearly at the periphery of what might legitimately be considered preempted. Unlike *Charas* and *Hodges*, there is no question in this case about the scope of the term "services" and how that term relates to personal injury claims. Nor is this a borderline case, where the Court could offer guidance as to where the line should be drawn between claims that are preempted and those that are too tenuously related to airline rates, routes or services to fall within the scope of Section 105(a)(1) of the ADA. The tort claims in this case relate directly to airline rates, routes and services and, as the Seventh Circuit concluded, would plainly have a "significant economic effect" on rates, routes and services. As a result, those claims should be preempted no matter what test is applied.

As the Seventh Circuit properly concluded, allowing petitioners to pursue their tort claims in this case would "make a mess of things," subjecting airlines to confusing and conflicting state regulation of their decisions regarding service to be provided, routes to be flown, and rates to be charged. App. 15a. In *Wolens*, this Court recognized that state regulation through the imposition of tort liability is just as clearly prohibited as direct public utility-style regulation would be. The various states could not purport to regulate the contractual relationships between major and regional carriers by, for example, limiting the right of major carriers to terminate regional carriers. It necessarily follows that state tort policies cannot be used, as petitioners sought to do in this case, to achieve the same result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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